BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHERYLE M. STALEY	)	
Claimant	)	
	)	
VS.	)	
	)	
RANSOM MEMORIAL HOSPITAL	)	
Respondent	)	Docket No. 1,050,723
	)	
AND	)	
	)	
WAUSAU BUSINESS INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 10, 2010, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Frank S. Eschmann, of Topeka, Kansas, appeared for claimant. Andrew D. Wimmer, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant proved by a preponderance of the evidence that she suffered personal injury in an accident that arose during pre-employment testing on April 22, 2010. Respondent was ordered to provide medical testing and treatment as recommended by Dr. Craig Yorke. The ALJ also ordered respondent to pay claimant temporary total disability benefits from April 23, 2010, until claimant is released to return to work without restrictions, is released to return to work with restrictions that permit substantial gainful employment, or reaches maximum medical improvement.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 9, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that although claimant had been conditionally offered employment, she was not an employee of respondent. Further, respondent contends that there is no objective evidence claimant suffered an accidental injury on the date alleged.

Accordingly, respondent asks the Board to reverse the ALJ and deny preliminary benefits to claimant.

Claimant argues that the ALJ correctly applied the law to the facts and found that claimant was an employee of respondent and that she sustained an accidental injury that arose out of that employment. Claimant also contends the respondent is implicitly arguing that the ALJ erred in finding that claimant was temporarily totally disabled. This Board Member does not interpret respondent's brief this way. Regardless, claimant correctly argues that this is not an issue the Board has jurisdiction to review in an appeal from a preliminary hearing order.

The issues for the Board's review are:

(1) Was claimant an employee of respondent at the time of her alleged accidental injury?

(2) If so, did the evidence prove claimant sustained an accidental injury that arose out of that employment?

FINDINGS OF FACT

Claimant applied for a job at respondent, Ransom Hospital. She was interviewed by the dietary manager for a position as a dietary specialist. Later, she received a telephone call communicating an offer of employment as a dietary aide. She was told she would have to undergo some testing and have a physical. She was told to go to the Gollier Center on April 22, 2010, at 9 a.m. for a physical capacity test and to the Ransom Hospital at 10 a.m. for a physical.

On April 22, 2010, claimant went to the Gollier Center and met with an occupational therapist for the purpose of having a physical capacity test. While she was performing one of the tests, lifting a 50-pound weight, she heard her back pop. When she later lifted a 25-pound weight, her back popped three more times. Her legs began to feel "like rubber" and she could hardly walk.[1] She testified she told the therapist that she had to wait because her back had popped and the therapist told her he had also heard something pop. The therapist then gave her instructions on the proper body mechanics of lifting. Ultimately claimant finished the testing, but she was in pain and there were some lifting tests left that she told the therapist she was unable to perform.

Claimant said she had never injured her back previously, nor had she ever had any restrictions placed against her relative to her back. Claimant testified that she did not tell

[1] P.H. Trans. at 10.

the therapist she had a left hip injury as a child and does not know why the therapist made that comment on the testing form.

After the testing, claimant and the therapist joined claimant's husband, who had been waiting for her. Claimant's husband testified he saw that his wife was having problems after the testing. He testified that she had been fine when she went in for the testing. He said he overheard his wife tell the therapist that she had suffered an injury to her back when it popped.

Claimant then went to Ransom Hospital for a physical examination, which was performed by Dr. Jo Anna McCalla, an employee of respondent. Claimant testified that she was unable to push with her legs and also that her hand was shaking when Dr. McCalla was pushing on it. Claimant said she told Dr. McCalla that her hand was shaking and she could not push with her legs because her back was hurting her. However, in the medical report issued by Dr. McCalla as a result of that examination, there is no mention that claimant complained about back pain. The report states that previous to the medical examination, claimant had undergone the physical capacity testing. The report states:

> She states that she had no problems with that except that she was unable to lift things above the shoulder area. She said that she felt this was due to deconditioning and that with time this would get better. Otherwise, she reported no complaints, no problems.[2]

The next day, April 23, 2010, respondent sent claimant a letter rescinding its offer of employment because she did not pass the post-offer pre-employment physical. Claimant never filled out a W-2 form for the IRS, nor did she ever receive an employee handbook.

Claimant went to see her personal physician, Dr. Scott Corder, on April 27, 2010. Dr. Corder told claimant to stay off work and ordered x-rays and a lumbar and thoracic spine MRI. The MRI was done on April 28, 2010. Dr. Corder told claimant she had a herniated disc at L5-S1 and a possible compression fracture of the L1 vertebra.

Sue Martin, respondent's Director of Human Resources, testified that a conditional offer of employment was made to claimant on April 20, 2010. She said claimant was directed by respondent where to go in order to have a physical capacity test. Ms. Martin spoke with claimant after the physical capacity test and the physical by Dr. McCalla. She testified that claimant did not mention to her that she had injured her back during the testing.

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[2] P.H. Trans., Resp. Ex. G at 1.

Because claimant was unable to perform all the lifting portions of the physical capacity test, respondent sent her a letter rescinding the offer of employment. On May 3, 2010, claimant contacted Ms. Martin and told her she thought she had injured her back during the physical testing. Ms. Martin testified she had not been told before May 3 that claimant had been injured during the testing.

At the request of respondent, claimant was seen by Dr. McCalla on May 13, 2010. Dr. McCalla told her she should be off work, suggested she use a walker, and referred her to Dr. Craig Yorke. Dr. Yorke saw claimant on June 1, 2010. His report indicates that claimant told him she was injured while applying for a job in the dietary department at respondent. She said she was lifting a 50-pound object three times when she heard a pop in her back and experienced immediate pain in her back and legs. After examining claimant, Dr. Yorke recommended further treatment.

At the preliminary hearing, respondent introduced a letter from the occupational therapist, Dan Van Buskirk, which read in part:

> Ms. Staley did not complain of any pain through out the testing. I did not hear Ms. Staley's bones or joints pop and crack.
> Ms. Staley did not complain of any pain at the time of my evaluation.[3]

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-501(g) states:

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[3] P.H. Trans., Resp. Ex. J.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

The ALJ, in his Order, cited the Board's decision in *Hazen*,[9] which held that an accidental injury occurring during pre-employment testing after a conditional offer of employment arises out of and in the course of employment. The undersigned Board Member agrees with the ALJ's analysis and finding that claimant was an employee at the

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[4] K.S.A. 2009 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2009 Supp. 44-555c(k).

[9] *Hazen v. Riverside Hospital*, No. 196,529, 1998 WL 100149 (Kan. WCAB Feb. 23, 1998).

time of her injury for purposes of coming within the provisions of the Workers Compensation Act.

The ALJ noted the inconsistencies in the record and conflicting testimony of the witnesses but, nevertheless, determined that claimant's version of the facts was the most credible. Having reviewed the testimony and exhibits presented to date, this Board Member agrees with the ALJ. Claimant has proven she suffered personal injury by accident on April 22, 2010, during her occupational screening test as alleged. On April 22, 2010, when she underwent the screening evaluations, claimant was trying to get a favorable recommendation from respondent's occupational therapist, Mr. Van Buskirk, and respondent's occupational physician, Dr. McCalla. It is understandable that she would try to minimize her injury at that time. Nevertheless, within a few days thereafter, she sought medical treatment from her personal physician, Dr. Corder. His records are not in evidence. After the MRI, claimant was seen again by Dr. McCalla, who referred claimant to Dr. Yorke. Dr. Yorke's June 1, 2010, report contains a history and description of the accident which is consistent with claimant's testimony.

CONCLUSION

(1) For purposes of the Workers Compensation Act, claimant was an employee of respondent at the time of her accidental injury.

(2) Claimant has met her burden of proving she sustained injury by accident that arose out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated June 10, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Frank S. Eschmann, Attorney for Claimant
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge